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UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

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) DEFENSE MOTION TO  
) DISMISS FOR VIOLATION OF  
) EQUAL PROTECTION CLAUSE  
)  
) 1 October 2004

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1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004.

2. Relief Sought. That the Military Commission find that the President's Military Order authorizing trial by Military Commission is in violation of the laws of the United States and dismiss the charge against Mr. Hamdan.

3. Overview. The President's Military Order (Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism) issued 13 November 2001 is illegal because it is in direct contravention of Equal Protection Guarantees in the Constitution of the United States of America.

4. Facts.

a. On 13 November 2001, President Bush issued a military order pursuant to the authority vested in him as President of the United States and Commander in Chief of the Armed Forces of the United States by the Constitution and laws of the United States vesting in the Secretary of Defense the authority to try by military commission those persons that President Bush determined were subject to the order.

b. The President's Military Order of 13 November 2001 applies exclusively to non-citizens of the United States.

c. Subsequent to the President's Military Order of 13 November 2001, Mr. Hamdan was taken XXXX in late November 2001, XXXX and has been detained by the United States government ever since.

d. On 3 July 2003, the President of the United States determined that Mr. Hamdan was subject to his military order of 13 November 2001.

e. On 13 July 2004, a charge of conspiracy to commit terrorism against Mr. Hamdan was referred to this Military Commission.

5. Law.

a. The President's Military Order Violates the Fifth Amendment's Guarantee of Equal Protection Because It Unlawfully Discriminates Against A Suspect Class

1. Aliens Are a Suspect Class under the Fourteenth Amendment

(a) The Fourteenth Amendment to the United States Constitution, a fundamental provision passed in the wake of the Civil War, states that government shall not "deny to any person within its jurisdiction the equal protection of the laws." It is this provision that led to the desegregation of the American school system in *Brown v. Board of Education* (1954), as well as any number of other landmarks throughout our history.

(b) The President's Military Order bars citizens from appearing before the commission as defendants. Mr. Hamdan is thus being held for trial before a military commission only by virtue of his status as an alien. This order is the first of its kind to make this citizen/alien distinction in a matter of fundamental justice, whether in the military or the civilian system. In doing so, it runs afoul of the animating purpose of the Equal Protection Clause.

(c) The Framers of the Clause understood that discrimination against aliens was pervasive and problematic and intentionally extended the reach of the Clause to "persons" rather than confining it to "citizens." Foremost in their minds was the language of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449 (1857), which had limited due process guarantees by framing them as nothing more than the "privileges of the citizen." The drafters of the Amendment wanted to overrule that tortured precedent, which gave only citizens rights.

(d) The Supreme Court has long recognized that "classifications based on alienage" are "inherently suspect and subject to close judicial scrutiny" under the Fourteenth Amendment. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). This treatment of aliens as a suspect class accords with both the original understanding of the Fourteenth Amendment and the fundamental purpose of the Equal Protection Clause. The Framers of the Equal Protection Clause intentionally extended the reach of the Clause beyond merely "citizens" to all "persons." See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1442-47 (1992). As the Amendment's principal author, John Bingham, asked, "Is it not essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection?" Akhil Reed Amar, *The Bill of Rights*, 173 (1998); see generally *id.* at 170-72. This heightened solicitude for aliens flows naturally from the Clause's purpose of protecting "discrete and insular minorities" from prejudice. *United States v. Carolene Prods.*, 304 U.S. 144, 152-53 n.4 (1938). Aliens are "a prime example of a 'discrete and insular' minority" because they cannot vote. *Graham*, 403 U.S. at 372. The Supreme Court, therefore, has applied heightened scrutiny to state laws that heap special disfavor on aliens. See, e.g., *In re Griffiths*, 413 U.S. 717, 721-22 (1973) (finding alienage to be a suspect classification); *Graham*, 403 U.S. at 372 (stating that state "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny" (citations omitted)).

2. Aliens Should be Treated as a Suspect Class for Purposes of this Case

(a) The guarantees of equal protection generally apply with equal force to the federal government. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) ("Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

(b) The Supreme Court has noted a narrow exception to this general rule when the government exercises its "paramount federal power over immigration and naturalization." *Hampton*, 426 U.S. at 100. Plainly, the federal government can make immigration and citizenship rules "that would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976). The Supreme Court has therefore refused to apply heightened equal protection scrutiny to laws related to federal immigration policy. Thus, in *Diaz*, the Court upheld a Medicare provision denying federal medical insurance to aliens who had not been continuous residents for at least five years. The Court recognized that Congress could withhold an entitlement based on "the character of the relationship between the alien and this country" under its "broad power over naturalization and immigration." 426 U.S. at 79-80. *See also Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (noting "the limited scope of judicial inquiry into immigration legislation").

(c) But this exception does not apply to actions of the federal government unrelated to immigration or naturalization policy. "When the Federal Government asserts an overriding national interest as a justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." *Hampton*, 426 U.S. at 103. In *Hampton*, the Court struck down a Civil Service Commission regulation restricting aliens' participation in the federal civil service. The Court reasoned that the regulation could not be justified by any plausible immigration rationale because the Commission's "normal responsibilities" do not include immigration policy. *Id.* at 105. *Hampton* and *Diaz* thus stand for the proposition that judicial scrutiny of federal classification of aliens "is relaxed to a 'rational basis' standard" *only* when "overriding national interests" in the field of immigration actually "predominate." *United States v. Lopez-Flores*, 63 F.3d 1468, 1473 (9<sup>th</sup> Cir. 1995). No such overriding national interest predominates here.

### 3. The Military Order Discriminates against Aliens and Therefore is Unconstitutional

(a) The Military Order subjects a person in the United States to trial before a military tribunal only if the person is an alien. The Order thus discriminates between citizens and non-citizens. In justifying this blatant facial discrimination, the Government "bears a heavy burden." *In re Griffiths*, 413 U.S. 717, 721 (1973). In particular, the Government must show that the discrimination in the Order is "necessary . . . to the accomplishment of its purpose." *Id.* at 722.

(b) The government cannot meet this burden. The stated purpose of the Military Order is to "protect the United States and its citizens [from] terrorist attacks." The Order accomplishes this purpose by subjecting suspected terrorists to military tribunals. But nothing in the Order suggests that military tribunals are *more necessary* for aliens than for

citizens suspected of terrorist activities. There is simply no reason why the government must subject aliens who have "engaged in, aided or abetted, or conspired to commit, acts of international terrorism" to military tribunals, but need not do so for citizens suspected of the same crimes. If a strong government need exists for treating aliens this way, that need would exist for citizens as well. Because the Military Order thus discriminates against a suspect class without any justification, the Order violates the Fifth Amendment.

b. The President's Military Order Violates the Fifth Amendment Because It Discriminates In the Allocation of Fundamental Trial Rights

1. Even were alienage not a suspect classification, the commission nevertheless would violate the Fifth Amendment because it discriminates in the allocation of fundamental trial rights. The Supreme Court has recognized that the government may not discriminate in the provision of fundamental trial rights on a merely rational basis, even based on non-suspect classifications. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 221, 230 (1982) (stating that, because education plays a "fundamental role in maintaining the fabric of our society," a Texas statute denying free public schooling to children who were not legally admitted into the United States must be justified by a "substantial" state interest and finding no such justification). Thus, the Court has struck down state statutes depriving the poor of appellate counsel, *Douglas v. California*, 372 U.S. 353 (1963), trial transcripts, *Griffin v. Illinois*, 351 U.S. 12 (1956), and appeal rights, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), even though poverty is not a suspect classification. *Harris v. McRae*, 448 U.S. 297 (1980).

2. Unlike the Supreme Court's cases extending deference to the federal government's classification of aliens, this case does not involve the simple preferential treatment of American citizens for government employment or economic benefits. Instead, this case touches the raw nerve of equal justice under law. The President's Military Order, based on citizenship, deprives individuals of the right to a jury trial presided over by a judge not answerable to a prosecutor. It further deprives individuals of the right to appeal to an independent tribunal. In short, the President's Military Order gives aliens an inferior method of adjudication. And it does so without even the pretense of a showing that such discrimination is necessary, and without any Congressional action. This departure from the fundamental protections of civilian justice violates the Fifth Amendment's guarantee of equal protection, irrespective of the degree of scrutiny at issue.

3. Crucially, the President's Military Order curtails rights that, at least when made available to others similarly situated, have long been deemed too fundamental to be dispensed with on a merely rational basis. If trial by jury, in cases where it is not independently mandatory, were, for example, made available to those who could afford to pay a certain fee (to defray the marginal costs to government of actually putting on a jury trial, protecting jurors, and the like), but not to those too poor to afford that fee, strict scrutiny, or something very close to it, would be mandatory, *e.g., M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Douglas v. California*, 372 U.S. 353, 355 (1963), despite the fact that poverty is not a suspect or even a semi-suspect classification. The same follows when rights as basic as the jury trial are dispensed to citizens but not to aliens who are charged with identical offenses and who have exactly the same

relationship to the *very same* international terrorist organizations with which we are at war.<sup>1</sup> In short, although considerable deference to the President is afforded in treating aliens less favorably than citizens in the distribution of Medicare, social security, or other similar benefits, or even in matters of employment, there is little or no room for government by approximation when it puts people on one side or another of a crude line that makes the difference between giving them access to the fundamental protections of civilian justice—from indictment to a jury trial presided over by a judge not answerable to the prosecutor, not to mention access to an appeal before a tribunal independent of the prosecuting authority—and relegating them to a distinctly less protective, and frankly inferior, brand of adjudication.<sup>2</sup> If the President may ever take such a step, shunting aliens into a procedure from which all U.S. citizens are spared, he may do so only upon a convincing showing of necessity, one that matches the claims of threat to the fact of alienage.

4. "There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *see also Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."). When defenders of the line being drawn in this case can, in truth, invoke little beyond the obvious political convenience of stilling the voices that might otherwise rise up in protest were American citizens subject to trial by military commissions, the Constitution demands more evenhanded treatment by the government.

6. Files Attached. None.

7. Oral Argument. Is required. The Presiding Officer has instructed the Commission members that he will provide the Commission members with his interpretation of the law as he sees it, but that the Commission members are free to arrive at their own conclusions. The Defense asserts its right to be heard following the Presiding Officer's pronouncement via oral argument in order for the remainder of the Commission members to be informed as to the reasons for the Defenses support or opposition to the Presiding Officer's position. Additionally, the Defense intends to call expert witnesses and to incorporate their testimony into this motion via oral argument.

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1. While such discrimination may have had some plausibility in fights against nation-states, in a situation like the one we confront vis-à-vis al Qaeda, where we confront a supranational terrorist organization drawing support from many nations but being identifiable with none of them, it seems irrational to distinguish among unlawful belligerents—all of whom are members of the same terrorist group and with all of whom we are thus at war—on the basis of whether or not they happen also to be citizens of the United States as opposed to being citizens of, say, Saudi Arabia, France, or some other nation that may or may not be among the sponsors of terror but with which we are not, in any event, at war. In other words, it is one thing to give preferential treatment to U.S. citizens over their alien counterparts when that means giving less favorable treatment to citizens of a nation with which we are at war (and members of that enemy nation's military), and quite another thing to give preferential treatment to U.S. citizens when noncitizenship, rather than being a proxy for membership in the armed forces of the enemy, simply means that one is merely an unlawful belligerent rather than being a traitor as well—hardly a reason to be treated *more* harshly.

2. To be sure, if America is at war with one or more sovereign states, as it was in World War II with Germany, Japan, and Italy (the now-old "axis" powers), the federal government's decision to treat citizens of those enemy states in a harsher manner than it treats American citizens, and indeed even American citizens who might have taken up with the enemy, at least has a long-standing statutory tradition under the still-existing Alien Enemy Act of 1798, which authorizes the government to detain and deport nationals of a nation against which Congress has declared war.

8. List of Legal Authority Cited.

- a. 14<sup>th</sup> Amendment, United States Constitution
- b. 5<sup>th</sup> Amendment, United States Constitution
- c. *Brown v. Board of Education*, 347 U.S. 483 (1954)
- d. President's Military Order, 13 November 2001
- e. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449 (1857)
- f. *Graham v. Richardson*, 403 U.S. 365, 372 (1971)
- g. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1442-47 (1992)
- h. Akhil Reed Amar, *The Bill of Rights* 173 (1998)
- i. *United States v. Carolene Prods.*, 304 U.S. 144, 152-53 n.4 (1938)
- j. *In re Griffiths*, 413 U.S. 717, 721-22 (1973)
- k. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976)
- l. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)
- m. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995)
- n. *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)
- o. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)
- p. *United States v. Lopez-Flores*, 63 F.3d 1468, 1473 (9<sup>th</sup> Cir. 1995)
- q. *Plyler v. Doe*, 457 U.S. 202, 221, 230 (1982)
- r. *Douglas v. California*, 372 U.S. 353 (1963)
- s. Trial Transcripts, *Griffin v. Illinois*, 351 U.S. 12 (1956)
- t. Appeal Rights, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)
- u. *Harris v. McRae*, 448 U.S. 297 (1980)

v. *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949)

w. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990)

9. Witnesses and/or Evidence Required. The Defense intends to call Professor XXXX, (Curriculum Vitae attached) as an expert witness in the area of constitutional law and statutory law including the application of the Equal Protection Clause. Professor XXXX's expert testimony is probative to a reasonable person under the circumstances presented specifically, based on the Professor's skill knowledge, training and education. He possesses specialized knowledge of the laws of the United States relating to equal protection. The application and substance of such laws is a legal finding to be made by members of the Military Commission beyond the training and expertise of lay persons. As such, Professor XXXX's specialized knowledge will assist the Commission members in understanding and determining whether the President's Military Order of 13 November 2001 violates 42 U.S.C. 1981.

10. Additional Information. None.

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